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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the Ninth Circuit Court of Appeals

Brief of Amici Curiae States of Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, Oklahoma, South Dakota, Texas, Washington and Wyoming in Support of Petitioners

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STATEMENT OF INTERESTS OF AMICI CURIAE

Congress enacted the Reclamation Act of 1902 to tame and use the unharnessed waters and to reclaim the arid and semi-arid lands of the West. The Western States named herein as *amici curiae* constitute, with California, sixteen of the seventeen states subject to the provisions of the Act.[1] Pursuant to the Act, reclamation projects authorized by Congress span these *amici* states in the form of storage reservoirs, diversion dams, and other water works. Water deliveries from these project facilities at the end of 1974

1. The State of Utah has not joined this brief, but will file a separate brief in support of the Petitioners.

totaled 29.7 million acre-feet and served a record high of 17.6 million people (31% of the population of the 17 Western States). U.S. Department of Interior, Bureau of Reclamation, *Water and Land Resource Accomplishments,* 1974: Summary Report, 2.

When the United States, by the passage of the Reclamation Act, entered the field of building large scale irrigation projects, it carried forward a policy which it had long approved, encouraged and used: a policy of recognizing the laws of the states and territories as the sources of water rights. Thus, one of the fundamental concepts of the 1902 Act was Section 8:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . ." 32 Stat. 390 (1902), 43 U.S.C. § 383 (1970).

An objective appraisal of the text of this provision would lead any fairminded observer to the conclusion that Congress intended that the government's right to divert and impound water for a reclamation project must be received from the state, and further that the acquisition of project water should be treated as an appropriation, which, consistent with congressionally approved western water laws, can only be based on beneficial use. *United States v. Bennett,* 207 F. 524 (9th Cir. 1913); *West Side Irrigation Co. v. United States,* 246 F. 212 (9th Cir. 1917); *see* F. J. Trelease, *Arizona v. California,* 1963 Supreme Court Review 158, 189.

The Bureau of Reclamation, charged with administering the Act, has historically followed the plain instructions of Section 8 in acquiring water for reclamation projects. In *United States v. Gerlach Livestock Company,* 339 U.S. 725 (1950), the Supreme Court quoted a statement of the Bureau with respect to Section 8 as follows:

> **"'. . . [T]he Bureau of Reclamation and the Secretary of the Interior have consistently, through the forty two years since the 1902 act, been zealous in maintaining compliance with Section 8 of the 1902 act. They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws. Ample demonstration of the effect of this law and policy of administration, in action, has been given in connection with the Central Valley Project. Water filings made by the State have been obtained by the Bureau of Reclamation by assignment. . . .'" 339 U.S. 725, 740-41, n. 15.**

The Ninth Circuit's decision pays little heed to either the language or purposes of Section 8, or to the way in which the Section has historically been recognized and followed by federal and state agencies since 1902. According to the Ninth Circuit, the section requires the Bureau of Reclamation to apply for an appropriative permit from the state, requires the state to issue the permit if unappropriated water is available, and frees the Bureau of conditions imposed in such permits by the state. This is not what the section says, or how the section has been historically applied. The court has thus sanctioned an alteration of several decades of settled administrative practice. It has further eliminated the operation of California state law provided for in the Reclamation Act with respect to the

acquisition and use of project water by the Bureau, notwithstanding that the state's destiny is substantially influenced by how these waters are used.

Although the Ninth Circuit's decision necessarily applies only to the State of California, its holding rests on a fundamental misconception of the meaning and purposes of Section 8 of the 1902 Act. That misinterpretation, applied to the other *amici* states, would eliminate any discretionary authority of the states to control the allocation of water stored at federal reclamation facilities. The *amici* thus urge that the judgment of the Court of Appeals be reversed.

STATEMENT OF THE ISSUES

This case presents the question whether, under the Reclamation Act of 1902, the United States, acting through the Bureau of Reclamation (the "Bureau"), must obtain and comply with permits issued by the State of California, acting through its State Water Resources Control Board (the "State Board"), in instances where the Bureau seeks to acquire unappropriated water for reclamation purposes.

STATEMENT OF THE CASE

In its complaint for declaratory relief, the United States claimed that (1) the Bureau need not apply to the State Board for a permit to obtain unappropriated water for a federal reclamation project, (2) if the Bureau applies for such a permit as a matter of "comity," the State Board must grant the permit if unappropriated water is available, (3) in the latter event, the State Board cannot impose any conditions in the permit, and (4) Decision 1422, a decision rendered by the State Board which imposes conditions in permits issued to the Bureau to acquire water for the New Melones Project in California, is void in all respects "where that decision conflicts with or contravenes federal law."

California contended that, (1) under federal law, the Bureau must obtain and comply with permits issued by the State Board in acquiring unappropriated water for federal reclamation projects, (2) under federal law, the State Board may impose conditions in such permits, to the extent that such conditions are not inconsistent with Congress' reclamation laws or policies, (3) the conditions imposed in Decision 1422 are not inconsistent with Congress' reclamation laws and policies, and thus are authorized by federal law, and (4), assuming *arguendo* that the Bureau need not obtain a permit from the State Board to acquire unappropriated water, the Bureau must comply with conditions in such permits when it elects to obtain such permits.

The trial court's decision is reported at 403 F.Supp. 874 (E.D. Cal. 1975). The court granted summary judgment for the United States, and denied California's motions for summary judgment and for judgment on the pleadings. In its decision, the trial court ruled that the Bureau "must" apply to the State Board for a permit to acquire unappropriated water, as a matter of "comity." *Id.* at 889-90. However, the court ruled that the State Board *must* issue such a permit once it determines that unappropriated water is available, and may not impose conditions in such a permit. *Id.* The court also rejected California's view that the Bureau must comply with conditions in such permits, when it elects to obtain such permits. The court accordingly voided Decision 1422 to the extent that it imposed conditions in permits issued to the Bureau.

The Court of Appeals affirmed the judgment with only one exception. 558 F.2d 1347 (9th Cir. 1977). It concluded that the requirement for application to the State Board

was not a matter of "comity," but a requirement of Section 8 of the 1902 Reclamation Act.

The brief of the petitioners provides a thorough discussion in its "Statement of the Case" of the legislative history of the New Melones Project. California's appropriative procedures, including those factors upon which the State Board must base all water allocation decisions, and the specific action (Decision 1422) which gave rise to the present litigation. In the interest of brevity, this discussion will not be repeated here.

ARGUMENT

1. The Lower Court Decisions, in Exempting the Bureau of Reclamation from State Permit Systems, Alter Several Decades of Settled Administrative Practice.

The Bureau of Reclamation has consistently complied with the states' appropriation laws, including the permit systems on which those laws are based, since the passage of the Reclamation Act of 1902. Also, the Bureau has consistently acknowledged, since 1902, its obligation to comply with the states' appropriation laws. Therefore, the Ninth Circuit's affirmance of the District Court judgment alters several decades of settled admintrative practice.

In 1956 hearings before the Subcommittee On Irrigation and Reclamation of the Senate, a representative of the Department of the Interior stated that the official position of Interior regarding the coverage and effect of Section 8, was that Section 8 completely controls the acquisition of water rights for the project. Hearings on S. 863 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong. 2d Sess. 101 (1956).

The Bureau has recognized its obligation to comply with state law in the acquisition of water rights in its internal regulations. Under the heading "Project Formulation" in the Bureau's "Instructions" dated July 16, 1959, it is asserted that:

> "Project plans must comply with state legal provisions or priorities for beneficial use of water, interstate water compacts, court decrees allocating water among states, water rights, and related matters." Instructions, § 116.3.3 (July 16, 1959).

Under the heading of "River Regulation," dated January 10, 1957, the Bureau advises that:

> ". . . the Reclamation Act recognizes the interests and rights of the states in the utilization and control of their water resources and requires that the Bureau, in carrying out provisions of the Act, proceed in conformity with state water laws. Since the construction of a reservoir and the subsequent storage and release of water for beneficial purposes normally entails stream regulation, it is necessary to reach an understanding with the state regarding reservoir operating limitations." Instructions, § 231.5.1 (January 10, 1957); *see* C. Wheatley & C. Corker, *Study of the Development, Management and Use of Water Resources on the Public Lands* 327-28 (1969).

As recently as October 10, 1975, even after the District Court's decision, the Commissioner of Reclamation stated:

> "We recognize that the ultimate right to store, divert, and utilize water in accordance with applications made pursuant to state laws is one of the key elements of past, present, and future development in the West. Each state has the duty to determine under its own statutes how its unappropriated water is to be

used. Since 1902, the Bureau has consistently taken the position that it will obtain under state law its rights to store and divert water for its projects recommended for Congressional authorization." Remarks by Gilbert G. Stamm to the California Water Resources Assn., San Francisco, California, Oct. 10, 1975.

Consistently with the above statements and instructions, the Bureau has in fact complied with state laws in the initiation of a project, even in those cases in which delay or inconvenience in implementing the project is the price of compliance. Thus, in one case a project was classified as detrimental to the public interest and the state permit was issued only after the federal government, through negotiations, modified its water right application. *See* Trelease, *Reclamation Water Rights,* 32 Rocky Mtn. L. Rev. 464, 466-69 (1960). Another case involved a Bureau plan to divert the water of a river contrary to the terms of a state statute and before implementing the project, the federal government agreed to provide a separate storage dam. *Id.*

On the other hand, in order to facilitate compliance with Section 8 requirements, a number of the Western States have made special provisions for the government appropriation of water which tend to facilitate appropriation. *Id.*

As the petition of the State of California points out, California has enjoyed 75 years of similarly successful accommodation between federal and state interests in the reclamation program. Nevertheless, the Ninth Circuit has chosen to abrogate the state's role in California's reclamation projects. Therefore, the *amici* urge the Court to reverse the judgment below, not in order to establish a new, untested federal-state relationship in California, but to continue this historic and successful partnership.

2. The Ninth Circuit's Decision Overturns That Which Congress Intended to Accomplish in 1902, and Re-Writes Federal Reclamation Law by Developing a New Water Doctrine Not Contemplated by Congress.

Because in vast areas of the West rainfall is slight and water is precious, public policy dictated a rule of law under which water rights could be lost by non-use and acquired only by beneficial use of water. Under the appropriation approach, the first to make a beneficial use of water is protected in that right to the extent of his use. What is a "beneficial use" is determined by the law of the state in which the use occurs. Thus the appropriation doctrine enables the state to prevent waste and mismanagement of its waters and, unlike the riparian doctrine, vests the state with broad control over its waters.

To help facilitate settlement of the West, Congress gave its approval to this water law practice. Thus, in the Mining Act of 1866, Congress confirmed vested rights for mining, agricultural, manufacturing and other purposes that were recognized by the local laws and customs, and approved the appropriative system as a method of obtaining future water rights. 14 Stat. 262 (1866), 43 U.S.C. § 661 (1970); *Atchison v. Peterson,* 87 U.S. (12 Wall.) 507 (1874); *Basey v. Gallagher,* 87 U.S. (12 Wall.) 670 (1874). The Desert Land Act of 1877 encouraged the settlement of irrigable lands by making large tracts available to those who would reclaim them. The Act declared that all non-navigable sources of water on the public domain were held free for appropriation. 19 Stat. 377 (1877), as amended, 43 U.S.C. § 322 (1970). The Court has held that, by this Act, all these waters were severed from the land and reserved for the public under the laws of the states and territories. *California-Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935).

It was with this statutory background that the 1902 Reclamation Act was passed. As with the earlier Acts, western congressmen were again successful in securing in the federal enactment provisions which reserved to the states broad control over their water resources so that they could participate in the reclamation process in a very fundamental way. Thus, Section 8 of the 1902 Act provides:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . ." 32 Stat. 390 (1902), 43 U.S.C. § 383 (1970).

It is difficult to conceive of any other statutory language which could make clearer that the Bureau of Reclamation in developing water resources in the West is obliged to respect the state's regulatory authority in securing unappropriated water in the state for development of a particular project.

Furthermore, the legislative history of Section 8 removes any doubt that the Section was intended to require the Secretary to comply with state laws both in acquiring and distributing project water. Several senators and congressmen addressed themselves to this question during the 1902 congressional debates. Congressman Mondell of Wyoming, the spokesman for the bill in the House of Representatives, responded at length to a question asking for clarification "upon the subject of national or state control." 35 Cong. Rec. 6677, 57th Cong., 1st Sess. (1902). He responded by

quoting President Theodore Roosevelt for the proposition that "the distribution of the water, the division of the streams among irrigators, should be left to the settlers themselves in conformity with State laws." *Ibid.* He stated that Section 8 merely followed traditional federal legislation "recogniz[ing] local laws and customs appertaining to the appropriation and distribution of water used in irrigation." *Id.* at 6679. The motto which he used to describe the scheme of the reclamation bill was "National Expenditure, Local Administration." *Id.* at 6677. Indeed, in all the legislative history of this hotly debated Act, no Senator or Congressman dissented from this construction of the Act. Further, no Senator or Congressman suggested the view that was the basis of the Ninth Circuit's decision.

The Ninth Circuit's decision inexplicably makes no reference to the extensive legislative history, or to the administrative practice of the Bureau of Reclamation in complying with the states' appropriation laws under Section 8. Instead, the court holds simply that Section 8 requires the Bureau to obtain a permit under state law, but not to comply with conditions in the permit. However, nothing in Section 8 supports any distinction between a permit and its conditions. The court stated that its conclusion is supported by the fact that California did not develop its permit system until after 1902. 558 F.2d at 1350. If this is so, then on what basis does the court conclude that Section 8 requires the Bureau to comply with the "forms" of the states' permit procedures? If the Section is sufficiently clear to require the Bureau to obtain a permit under state law, it is sufficiently clear to require the Bureau to comply with conditions in the permit. Thus, the court appears to have re-written the federal reclamation laws, and, as suggested in the concurring and dissenting opinion, to have developed a new "federal

common law." 558 F.2d at 1352, n. 2. If the federal reclamation laws are to be re-written, such is the task of Congress, not the courts.

3. The Judicial Decisions Interpreting the Reclamation Act Do Not Support the Court of Appeals' Decision.

The Court has upheld the literal interpretation of Section 8 which requires the Bureau to comply with state laws in acquiring water for reclamation purposes, even to the extent that such laws condition the use of such water. Thus, in *Nebraska v. Wyoming,* 295 U.S. 40 (1935), the Court declared:

> ". . . [T]he Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law." 295 U.S. at 43.

The Court further noted that "all of the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release waters of the rivers are subject to the authority of Wyoming . . ." *Id.* at 42.

Thus, the Court unequivocally ruled that the Secretary is fully subject to state appropriation laws. The Court some ten years later approved the above language. *See Nebraska v. Wyoming,* 325 U.S. 589 (1945). The Court further stated that Congress, in passing Section 8, had chosen to require the Secretary to "proceed in conformity with" state appropriation laws, and indeed that the Secretary had in fact complied with these laws by obtaining permits from state officials. *Id.* at 611-13, 616. These permits, the Court noted, contained various conditions. *Id.* at 613.

The next Supreme Court decision to consider the interpretation of Section 8 was *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958). The issue in *Ivanhoe* was extremely simple: Was Section 8 intended to override Section 5 (limiting the size of farms receiving reclamation water to 160 acres), where state law embodied a policy against such a limitation? The obvious answer was given: (1) To the extent there was a conflict between the particular language of Section 5 and the general language of Section 8, the former prevailed, and (2) to the extent federal law embodied in Section 5 conflicted with state law, the former also prevailed under the Supremacy Clause:

> "We read nothing in Section 8 that compels the United States to deliver water on conditions imposed by the state. To read Section 8 to the contrary would require the Secretary to violate Section 5, the provisions of which have been national policy for over half a century." 357 U.S. 275, 291-92 (1958).

In short, all the Court in *Ivanhoe* held was that Section 8 does not require the federal government to comply with state law which would frustrate an explicit national policy expressed in the Federal reclamation laws relating to the delivery of project water. However, the Court did not conclude that state law could not apply to acquisition and distribution of water where no national policy was frustrated; indeed, it specifically noted that federal compliance with state laws was necessary to "acquire water rights or vested interests therein . . ." *Id.* at 291.

In *City of Fresno v. California,* 372 U.S. 627 (1963), individual and municipal water users contended that California statutes gave a statutory priority to the use of water for municipal or domestic purposes and that, since Section 8 required compliance with state laws in the acquisi-

tion of such vested water rights, the Bureau could not acquire and utilize their rights for irrigation purposes pursuant to the Bureau's eminent domain powers under Section 7 of the 1902 Act. The Court rejected their position, holding:

> ". . . [S]ection 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others. . . . Rather, the effect of Section 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." *Id.* at 630.

Thus, the *City of Fresno* case can best be understood as the application of a quite narrow and traditional canon of statutory interpretation: that the specific controls the general; that is, where Congress has laid down a specific mandate, that specific mandate may not be ignored in favor of a general policy of deference to state law. Although this view seems questionable in view of the congressional debates, it is clear that it provides no guidance in this case, since it does not deal with the power of the federal government to obtain rights to unappropriated water without compliance with state procedures. Indeed, the trial court properly noted that the *City of Fresno* decision "is not particularly relevant to the inquiry in this case." 403 F. Supp. at 892.

The Court's lengthy decision in *Arizona v. California,* 373 U.S. 546 (1963), also sheds no light on the specific legal issue before this Court. The states argued in that case that Sections 18 and 14 of the Boulder Canyon Project Act required the Secretary, in distributing project water, to comply with the laws of the states. Section 18 of the Act

contains language similar to that found in Section 8 of the 1902 Reclamation Act, except that Section 18 does not require the Secretary of the Interior to "proceed in conformity with" state laws. 45 Stat. 1057 (1928), 43 U.S.C. § 617q (1970). Section 14 of the Act provides that the project shall be operated pursuant to the general reclamation laws, "except as otherwise herein provided." *Id.* at § 617m. The Court however, relying on Section 5 of the Act, rejected the states' argument. Section 5 provides that no person may receive water from the project except pursuant to a contract with the Secretary. *Id.* at § 617d. The Court interpreted this section as giving the Secretary exclusive authority to determine the distribution of project water, to the exclusion of state authority. 373 U.S. at 579-585.

Thus, the Court again resolved a conflict between a specific statute, Section 5, and general statutes, Sections 18 and 14, similar to the approach of the Court in the *Ivanhoe* and *City of Fresno* cases. For this reason, the District Court properly concluded that *Arizona* did not control the question raised by this case; that is, whether the federal government, acting through the Bureau, must obtain and comply with permits necessary under state law for the appropriation of water.

In summary, subsequent decisions have not altered the literal interpretation of Section 8 recognized by the Supreme Court in *Nebraska v. Wyoming* with respect to the Bureau's obligation to acquire and use water for reclamation projects in conformity with state laws. Rather, at best, these subsequent decisions stand merely for the proposition that state laws cannot frustrate national policies expressed in Federal reclamation laws relating to the acquisition and delivery of project water.

4. In the Interests of Sound Public Policy, the Fundamental Accommodation of Federal and State Interests Achieved in the Reclamation Act of 1902 and Implemented with Success for Decades Should Not Be Discarded.

Decisions regarding the allocation of unappropriated water among competing demands have dramatic significance in the Western States. In determining where water will be diverted and used, a decision is directly made as to the locale of future growth and community development. In addition, by allocating an amount of unappropriated water to a selected beneficial use, the supply available for competing uses also within the state's legitimate concern is reduced. These decisions and determinations, although they will ultimately have import to some extent to the nation as a whole, have a significantly more profound effect on the development of the state, as they will shape the priorities for water uses between the state's farmers, cities and industries, and between these uses and competing environmental uses. Thus, determinations as to the use of water in the West involve a delicate and complex balancing of benefits and costs associated with each competing use of water and area of use. In exercising this responsibility, the states have developed elaborate administrative machinery which insures that the public will be allowed to fully participate in appropriation hearings, and to provide information relating to competing water needs.

On the other hand, it is not realistic to assume that Congress has a comparable level of interest regarding water management affairs, unassociated with navigation, within an individual state. Nor is it realistic to assume that Congress has the time or expertise to involve itself in the details of state water management, even assuming an inclination to do so. Thus, Congress, in authorizing reclamation projects throughout the West, provides few specifics in the authorizing legislation with respect to eventual project design, capacity and schedule of water use.

Congress was undoubtedly influenced by these considerations of public policy in providing for state control of the acquisition, use and distribution of reclamation project water. The result was that the 1902 Reclamation Law set up a dual control, a partnership between nation and state. Under this accommodation, the federal government is to build and operate the reclamation projects, and the states are to control the acquisition and use of water for the projects, as well as its distribution. Thus, the states were provided a voice in the projects that the national government had to respect. Not coincidentally, both federal and state authorities have faithfully honored this accommodation ever since the Act's passage.

Of course, this is not to say that state laws may override Congressional objectives as expressed in Congress' reclamation laws. This Court has made it clear that the Supremacy Clause countenances no such interference. *Ivanhoe Irr. Dist. v. McCracken, supra*, 357 U.S. 275; *City of Fresno v. California, supra*, 372 U.S. 627. However, where state and federal laws do not conflict, state laws should be allowed to operate. To do otherwise is to allocate exclusive decision-making power on water resources development to the federal government, despite the legislative history, judicial precedent, administrative construction and the plain meaning of the Reclamation Act itself. The fact that the project interferes with the state's own program for water development and conservation will be to no avail. The state will have no opportunity to have a voice in the project no matter what its effect. If the broad holding of the Ninth Circuit is not reversed, even conditions imposed in permits by California in order to protect prior rights will at best be con-

sidered merely advisory. Such complete bureaucratic autonomy is the exact antithesis of the western system of property rights in water.

CONCLUSION

The Western States joined in this brief as *amici curiae* are deeply concerned about the Ninth Circuit's decision in this case. It sanctions in California a reversal by the Bureau of Reclamation of a policy of complying with state laws in the acquisition and use of project water, a policy which has been faithfully followed throughout the Western States for 75 years. This policy was the product of the simple observation by Congress that the states have systems of local water law adapted to local water supply, climate and demand. The Federal Government does not. Therefore, Congress established a partnership between the federal and state governments whereby the federal government was to build and operate reclamation projects and the states, within the limits described in this brief, were to control the acquisition and use of project waters. Of course, it is not suggested that conditions imposed by a state in a permit issued to the Bureau of Reclamation for a reclamation project can either contradict an explicit provision or policy of federal law, or render a specific project useless. It is argued, however, that the states must have not only the power to determine the existence of unappropriated water, but also to give effect to provisions of state law, where appropriate, concerning the public interest, and to include in their determinations those conditions essential to the protection of existing rights. No court until now has sought to dissolve that congressionally established partnership. The clear dictates of Section 8 of the 1902 Reclamation Act and sound principles of public policy require that this partnership be continued. The *amici* urge therefore that the judgment of the Court of Appeals be reversed.

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